SAI KRIS CONSULTANCY SDN BHD A

v.

AUTONAS (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI JC
[COMPANIES WINDING UP NO: D-28NCC-78-2010]
2 AUGUST 2011

COMPANY LAW: *Winding-up - Stay of winding-up order - Application by minority shareholders - Companies Act 1965, s. 243(1) - Respondent's failure to pay invoice - Whether invoice proved to be fictitious and fraudulent - Whether s. 218 notice and petition wrongly served at old office address - Whether respondent had due notice - Whether directors of respondent acted in breach of fiduciary duties - Whether there was conspiracy between petitioner and directors to wind-up respondent - Whether applicants failed to discharge onus to obtain order for stay* C D

The applicants, who were minority shareholders/contributories of the respondent, applied under s. 243(1) of the Companies Act 1965 ('CA'), r. 7(2) of the Companies (Winding-up) Rules 1972 and the inherent jurisdiction of the court for an order, *inter alia*, that the winding-up order granted by the court be stayed permanently/or set aside *ex debito justitiae*. Briefly, the background facts were that the petitioner, Sai Kris Consultancy Sdn. Bhd., had issued an invoice to the respondent for the payment of the sum of RM126,000 being the fees and service tax for the services rendered. As the respondent failed to pay the invoice, the petitioner issued a s. 218(1)(e) CA notice to the respondent. The petitioner filed a petition to wind-up the respondent when the respondent failed to comply with the said s. 218 notice. As the respondent did not file any affidavit to oppose the petition, an order was granted by the court to wind-up the respondent and to appoint a private liquidator. After a lapse or more than nine months, the applicants filed the summons in chambers ('encl. 14') to stay and or/set aside the wind-up order. The applicant premised their arguments on *inter alia*, the following grounds (i) that the s. 218 notice and the winding-up petition had been wrongly served at the old registered office address of the respondent (ii) that the invoice was fictitious, false and/fraudulent; (iii) that the two directors and majority shareholders of the respondent, namely Siew Chee Weng ('Siew') and Wong Lok Kong ('Wong') had acted in breach of their fiduciary duties by failing to oppose the E F G H I

winding- up petition and (iv) that the petitioner and directors of the respondent had conspired to wind-up the respondent on its purported failure to pay the sum of RM126,000.

Held (dismissing encl. 14 with costs):

(1) The petitioner had made an official search on the respondent's registered address and as per the search results, there was no indication of any change of the registered address being filed with the Companies Commission of Malaysia or any amendment of the registered address being made by the Companies Commission of Malaysia. The s. 218 notice and the petition were thus properly served on the respondent at its registered address. The respondent had due notice of the s. 218 notice and of the winding-up petition. (para 5)

(2) The applicants failed to adduce any evidence to prove that the invoice issued by the petitioner was fictitious and false. The allegations thus remained bare allegations with no serious challenge mounted by the applicants based on fraud. The fact remained that the respondent had failed to pay the invoiced sum or any part thereof to the petitioner. Under s. 218(2)(a) CA, a creditor may petition to wind-up a company if it is indebted to it in a sum in excess of RM500 and has neglected to pay the sum for three weeks after a demand has been properly served. (para 5)

(3) The applicants had knowledge of the petition on 12 April 2010, and yet no attempt was made by them to stay the winding-up order granted on 8 April 2010 until encl. 14 was filed on 31 January 2011. No explanation whatsoever had been proferred by the applicants to account for their delay. An inordinate delay of more than nine months without explanation by the applicants in the circumstances of the case suggested a lack of *bona fides* on their part. (para 5)

(4) The applicants failed to take into consideration that by the time the s. 218 notice and the winding-up petition were served, Siew and Wong were no longer the directors of the respondent. Siew and Wong were replaced as directors of the respondent by Rosdi Abdul Wahab and Mohd Rizal Tutut. Thus, it was incorrect of the applicants to allege breach of duties by Siew and Wong. (para 5)

(5) The applicants alleged that there was a conspiracy and collusion between the petitioner, the directors of the petitioner and the solicitors for the petitioner to wind-up the respondent. Besides making serious allegations of conspiracy and collusion to injure the respondent, and especially against the solicitors for the petitioner who were merely carrying out their duties as advocates and solicitors on behalf of the petitioner, the applicants had wholly failed to adduce any evidence on affidavit to support their allegations. The applicants also failed to show exceptional or special circumstances in support of their application. (para 5)

(6) The court was not prepared to exercise its discretion to order a stay, permanent or otherwise, as the applicants had failed to discharge the onus or burden placed on them to cross the high threshold in order to obtain an order for stay under s. 243(1) CA. The interest of the public would not be served to allow the respondent, a dormant company which had not filed its audited accounts since 2003, in breach of ss. 169 and 171 CA, to be resurrected and be permitted to continue with its business. Further, where there are complaints of wrongdoing or irregularities by the applicants against the other directors of the respondent, it would be up to the private liquidator to investigate and report, and not for the applicants to stay the winding-up proceedings. (para 5)

Case(s) referred to:

City Audio Sdn Bhd v. Pengangkutan Kargo Udara Mas Sdn Bhd [1993] 1 LNS 19 HC ***(refd)***

Fairview Schools Bhd v. Indrani Rajaratnam & Ors [1998] 1 CLJ 285 CA ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Megah Teknik Sdn Bhd v. Miracle Resources Sdn Bhd [2010] 6 CLJ 745 CA ***(refd)***

Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC ***(refd)***

Teng Foh v. Liwu Realty Sdn Bhd [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA ***(refd)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 169, 171, 218(1)(e), (2)(a), 226(4), 235, 243(1), 304, 305, 306
Companies (Winding-up) Rules 1972, r. 7(2)

For the petitioner - R Shanmugam; M/s Hanif Idris & Assocs
For the respondent - Tan Kim Soon (Foo Lip Jeen & Cheng Poh Heng with him); M/s Tan Kim Soon & Co
For the liquidator - Mark Ho (Wajdi Mohamad with him); M/s Wajdi Mohamad & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Mah Weng Kwai JC:

[1] This is an application under s. 243(1) of the Companies Act 1965 (CA), r. 7(2) of the Companies (Winding-up) Rules 1972 and the inherent jurisdiction of the court by the three applicants who are the minority shareholders/contributories of the respondent, for an order that the Winding-Up Order granted by the court on 8 April 2010 be stayed permanently and/or set aside *ex debito justitiae*; the appointment of the Private Liquidator be terminated with immediate effect and that the costs of the application and of the winding-up petition be borne by the petitioner and its solicitors, M/s Hanif Idris and Associates.

[2] Background Facts

2.1. The petitioner was requested by the respondent to provide its consultancy and advisory services *vide* its letter of appointment dated 16 February 2009. The petitioner accepted the appointment by its Letter of Confirmation dated 18 February 2009. (See encl. 17 exh. VS4)

2.2. On 2 July 2009, the petitioner issued an invoice to the respondent for the payment of the sum of RM126,000 being the fees and service tax for the services rendered to resolve the outstanding shareholders' dispute in the respondent.

2.3. As the respondent failed and/or omitted to pay the invoice, the petitioner through its solicitors, M/s Hanif Idris and Associates issued a s. 218(1)(e) CA Notice dated 5 January 2010 to the respondent demanding payment of the sum of RM126,000.

2.4. The respondent failed to comply with the s. 218 notice and the petitioner filed a petition dated 2 February 2010 to wind up the respondent.

2.5. As the respondent did not file any affidavit to oppose the petition and in the absence of the respondent on 8 April 2010, an order was granted by the court to wind up the respondent and to appoint Gabriel Teo Chun as the private liquidator of the respondent, together with costs to be paid out of the assets of the company.

2.6. On 31 January 2011, after a lapse of more than nine months, the applicants filed the summons in chambers (encl. 14) to stay and/or set aside the winding-up order.

[3] Grounds Relied On By The Applicants

3.1. The applicants premised their arguments on *inter alia*, the following grounds:

3.1.1. that the invoice dated 2 July 2009 was fictitious, false and/or fraudulent in that the applicants being the minority shareholders, did not receive any consultancy or advisory services from the petitioner nor attended any of the alleged meetings with the petitioner's director, S. Vikneshvaran;

3.1.2. that the two directors and majority shareholders of the respondent namely, Siew Chee Weng (Siew) and Wong Lok Kong (Wong) had acted in breach of their fiduciary duties by failing to oppose the winding-up petition;

3.1.3. that the s. 218 notice and the winding-up petition had been wrongly served at the old registered office address of the respondent and

3.1.4. that the petitioner, its solicitors and the directors of the respondent had conspired and/or colluded to wind up the respondent on its purported failure to pay the sum of RM126,000.

Decision Of The Court

[4] On reading the summons in chambers and affidavits filed, the written submissions of counsel for the petitioner, the applicants and the private liquidator and upon hearing the oral submissions of counsel aforesaid, the court on 9 March 2011 dismissed the applicants' summons with costs.

[5] Reasons For The Decision

5.1. *Power to stay Winding-Up*

5.1.1. To begin with, the court holds the view that the applicants cannot apply in their summons to set aside the winding-up order. What the applicants are entitled to do is to apply to stay the winding-up order under s. 243(1) CA.

5.1.2. It has been held by the Court of Appeal in *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392 that a winding-up order cannot be rescinded or discharged after it has been made. An order may only be stayed under s. 243(1) CA. In fact, counsel for the applicants himself conceded that a winding-up order cannot be set aside but may be stayed only. However, counsel went on to argue that the decision in *Vijayalakshmi* had been decided *per incuriam* as the Court of Appeal had failed to consider the line of authorities such as *Teng Foh v. Liwu Realty Sdn Bhd* [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564, *Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd* [1993] 1 CLJ 204 and *City Audio Sdn Bhd v. Pengangkutan Kargo Udara Mas Sdn Bhd* [1993] 1 LNS 19 before arriving at its decision. Counsel for the applicants also sought to have the winding-up order set aside *ex debito justitiae* on the ground that the decision in *Vijayalakshmi* that a winding-up order can only be stayed, was mere *obiter dictum*. The court cannot agree with counsel for the applicants that the decision in *Vijayalakshmi* was decided *per incuriam* merely because the three cases cited above may not have been considered by the

Court of Appeal. A quick reference to the three cases will show that they are High Court decisions and which of course are not binding on the Court of Appeal. The court is also not persuaded to set aside the winding-up order *ex debito justitiae* as the proposition of law that a winding-up order cannot be discharged or rescinded after it had been made, was clearly stated in p. 395 of *Vijayalakshmi* by NH Chan JCA, although the main issue before the Court of Appeal in that case was the effect of the stay order of the then Supreme Court on the order of the High Court dated 22 March 1994. In any event, the contention of counsel for the applicants can be finally put to rest as the same proposition of law that a winding-up order cannot be set aside or rescinded and that the only proper remedy is to apply for a stay under s. 243(1) CA has been affirmed by the Court of Appeal in the recent case of *Megah Teknik Sdn Bhd v. Miracle Resources Sdn Bhd* [2010] 6 CLJ 745.

5.2. **Service Of s. 218 CA Notice And Winding-Up Petition**

5.2.1. At all material times the registered address of the respondent was at Suite 4.103, 4th Floor, Wisma Central, Jalan Ampang, Kuala Lumpur. A copy of the company search results issued by the Companies Commission of Malaysia was attached as exh. SKCSB 1 to the winding-up petition (encl. 1).

5.2.2. The applicants challenged the validity of the service of the s. 218 notice and of the petition on the ground that the registered address was an old address and that the Companies Commission of Malaysia had been informed of a change of address on 30 December 2009. The court held there was no merit on this ground as the petitioner had made an official search on the respondent's registered address on 4 January 2010 and as per the search results there was no indication of any change of the registered address being filed with the Companies Commission of Malaysia or any amendment of the registered address being made by the Companies Commission of Malaysia.

5.2.3. It was a finding of the court that the s. 218 notice and the petition were properly served on the respondent at its registered address on 5 January 2010 and 10 February 2010, respectively. The affidavits of service (encl. 5 – exh. MA3 and encl. 19 at paras 22 and 23) clearly show that the respondent had due notice of the s. 218 notice and of the winding-up petition.

5.3. **No Affidavit In Opposition Filed**

Importantly, no affidavit in opposition had been filed by the respondent and no one appeared on behalf of the respondent on the day fixed for the hearing to oppose the petition. The petition had been properly advertised and as papers were in order the Registrar's Certificate was issued to the petitioner on 1 April 2010. At all material times, the respondent did not dispute the invoice nor deny receipt of the s. 218 notice and the petition.

5.4. **The Invoice**

5.4.1. The applicants alleged that the invoice issued by the petitioner was fictitious or false, yet the applicants failed to adduce any evidence on affidavit to prove the falsity of the invoice. The allegations thus remained bare allegations with no serious challenge mounted by the applicants based on fraud.

5.4.2. The applicants also complained that the petitioner had no authority to bill and to collect the sum of RM6,000 being the 5% service tax payable on the sum of RM120,000 claimed. Quite apart from whether the petitioner was duly licensed by the Customs Department to collect service tax, the fact remains that the respondent had failed to pay the invoiced sum of RM120,000 or any part thereof to the petitioner. It is clear under s. 218(2)(a) CA that a creditor may petition to wind up a company if it is indebted to it in a sum in excess of RM500 and has neglected to pay the sum for three weeks after a demand has been properly served. In the case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437, the Federal

Court held that the s. 218(2)(a) notice should be liberally interpreted. A notice of demand under the sub-section need not specify the exact sum due as at the date of the demand. So long as the sum due exceeds RM500 and remained unpaid for three weeks after a demand has been made without any reasonable explanation to the satisfaction of the court, there is neglect to pay such sum within the meaning of the section. In this case the claim for the service tax in the invoice did not invalidate the invoice itself and most certainly did not invalidate the petition.

5.5. **Delay**

5.5.1. The applicants said they first became aware or had knowledge of the petition on or about 12 April 2010, yet no attempt was made by them to stay the winding-up order granted on 8 April 2010 until the summons in chambers (encl. 14) was filed on 31 January 2011. No explanation whatsoever has been proferred by the applicants to account for their delay. An inordinate delay of more than nine months without explanation by the applicants in the circumstances of the case suggest a lack of *bona fides* on their part.

5.5.2. Unfortunately for the applicants, it is too late in the day to file this application. They should have filed their notice of intention to oppose the petition and to be present in court on 8 April 2010 to be heard. Although the applicants were not themselves served with the petition, the advertisements and gazette notification of the petition served as notice to the public at large, including the applicants that the petition was to be heard on 8 April 2010. The applicants were deemed in law to have been served. (See the Memorandum of Advertisement in encl. 17 exh. VS1).

5.5.3. A winding-up petition is a class action for all contributories and creditors. While contributories and creditors need not apply to intervene in the winding-up proceedings, they are equally bound by

the decision of the court if they do not attend and participate in the proceedings. (See s. 226(4) CA and the Court of Appeal case of *Fairview Schools Bhd v. Indrani Rajaratnam & Ors* [1998] 1 CLJ 285.

5.5.4. The court holds that the applicants as contributories and shareholders, do not have the *locus standi* to challenge the petitioner's claim for the outstanding sum. Only the respondent, through its directors has the capacity to do so.

5.5.5. Additionally, it will be noted that no complaints have been made by the applicants to the private liquidator since the date of his appointment, against the alleged falsity of the invoice and to put the private liquidator on notice not to pay the petitioner. The applicants ought to have complained to the private liquidator that the invoice should have been directed to the directors Siew and Wong personally and not to the respondent and that in any event the director of the petitioner, S. Vicknesvaran is not a qualified person to give legal advice to the respondent.

5.5.6. The private liquidator has since carried out his duties and had furnished his full report as can be seen in exh. GTC 11 in encl. 23. No mention is made in the report of any allegations made by the applicants or the respondent against the invoice issued by the petitioner.

5.6. **The Directors**

5.6.1. As at 2 July 2009, the date of the invoice, the shares in the respondent were held by the applicants and Siew and Wong. Siew and Wong were the directors at the material time. It is the applicants' case that Siew and Wong had breached their fiduciary duties and responsibilities by failing to oppose the petition at the hearing on 8 April 2010. What is most surprising is that the applicants have failed to take into consideration that by the time the s. 218 notice and the winding-up petition were

served on 5 January 2010 and 2 February 2010 respectively, Siew and Wong were **no longer the directors** of the respondent. This can be clearly seen in the search results of the respondent, exhibited in exh. LKS3 in the applicants' affidavit in support (encl. 13). The results show that Siew and Wong **were replaced** as directors of the respondent by Rosdi bin Abd Wahab and Mohd Rizal bin Tutut both on 30 December 2009. Thus, it is incorrect of the applicants to allege the breaches of duties by Siew and Wong. If at all, the applicants should seek recourse against Rosdi bin Abd Wahab and Mohd Rizal bin Tutut, the directors of the respondent at the material time, for failing to oppose the petition.

5.6.2. Further, it will be noted that to date, no application has been made by the respondent to stay the winding-up order or any affidavit filed to support the applicants' application.

5.6.3. In 2009, the applicants had themselves filed an originating summons *vide* Kuala Lumpur High Court Case No. D8-26-36-2009 to wind up the respondent on the ground of oppression of minority shareholders. The originating summons was struck out *albeit* on a technical objection, and now that the respondent has been wound up on 8 April 2010, the applicants are nonetheless opposing the order. The equivocal position adopted by the applicants has not been explained and this again points to the lack of *bona fides* by the applicants in this application.

5.6.4. The applicants have alleged that there was a conspiracy and collusion between the petitioner, Siew and Wong as directors of the petitioner, the Company Secretary and the solicitors for the petitioner to wind up the respondent. Besides making serious allegations of conspiracy and collusion to injure the respondent, and especially against the solicitors for the petitioner who were merely carrying out their duties as advocates and solicitors on behalf of the petitioner, the applicants have wholly failed to adduce any evidence on affidavit to support their allegations. As such they remain bare allegations.

5.6.5. In an application to stay the winding-up order permanently the applicants bear the burden to show exceptional or special circumstances in support of their application. The applicants have wholly failed to discharge the burden to do so.

5.7. **Discretion Of Court**

5.7.1. Taking for a moment, that the court is prepared to accept 1) the failure of the applicants to file their notice of intention to appear and to oppose the petition, 2) the unexplained delay of nine months before filing this application, and 3) the applicants as contributories and shareholders have the locus to challenge the debt owing to the petitioner, the court is still of the view that the applicants will not be able to maintain and succeed in this application for the following reasons:

(i) the court is not prepared to exercise its discretion to order a stay, permanent or otherwise, as the applicants had failed to discharge the onus or burden placed on them to cross the high threshold in order to obtain an order for stay under s. 243(1) CA;

(ii) the court not only has to consider the position taken by the applicants as contributories and shareholders but also those of the petitioner, the private liquidator and the public at large. The petitioner and the private liquidator have not stayed quietly at the sidelines but have actively objected to the application. The interest of the public will not be served to allow the respondent, a dormant company which has not filed its audited accounts since 2003, in breach of ss. 169 and 171 CA, to be resurrected and be permitted to continue with its business. At the time of the winding-up proceedings, the respondent had only 1 asset which was charged to the bank, had no cash in the bank and did not employ any staff. The reason is clear. This is because an order of stay under s. 243(1) CA will be tantamount to a total discontinuance or

termination of the winding-up proceedings. (See *Vijayalakshmi (supra)*). A stay will not be conducive and even detrimental to commercial morality especially where there are allegations of misfeasance or wrongdoing made against the applicants by the respondent in the Kuala Lumpur High Court Civil Suit No. S22-812-2009 before the winding-up order was granted. These allegations of misfeasance or wrongdoing will have to be investigated by the private liquidator under ss. 235 and 304 to 306 CA. In the said Kuala Lumpur High Court Civil Suit, the respondent had sought to recover from amongst others, the applicants for alleged breaches of duties as directors of the respondent. In the case of *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 at 795, Gopal Sri Ram FCJ held that it was up to the liquidator to decide whether "to institute, continue the prosecution of or defend legal proceedings". Thus it is up to the private liquidator to decide whether to take any action against the applicants and where there is evidence of misfeasance or of irregularities demanding investigations an order of stay will be refused (see *Vijayalakshmi (supra)*).

(iii) Similarly, where there are complaints of wrongdoing or irregularities by the applicants against the other directors of the respondent, it will be up to the private liquidator to investigate and report, and not for the applicants to stay the winding-up proceedings. The circumstances of this application suggest that the motive of the applicants may be questionable and that the real reason for a stay is perhaps to delay or derail the proceedings in the said Kuala Lumpur High Court Civil Suit.

[6] In the result the summons by the applicants was dismissed with costs of RM5,000 each to the petitioner and private liquidator.